POLICY

Massachusetts Ocean Management – Introduction to Policy

The people of Massachusetts, the so-called "Bay State", have a long shared history and tradition associated with our ocean. Whaling, fishing, and importing were the economic foundation of the Massachusetts Bay Colony in the 17th Century. Even today, our port areas and ocean waters are critically important to the major industries of fishing, tourism, and commerce. Massachusetts continues to house one of the largest fishing industries in the nation, with the total value of marine fisheries landings and expenditures made by recreational anglers within the Commonwealth generating about $2 billion per year and supporting over 80,000 jobs. Today, over half of the full-time residents in Massachusetts live within 50 miles of the ocean, and these numbers do not account for the enormous influx of visitors and tourists that flock to our coastal communities during the summer months

Currently, the permitting process for projects in Massachusetts coastal waters can be quite complex. A wide range of applicable laws and regulations are intended to protect a diverse mix of resources and sometimes-competing uses, and the statutes themselves date from the earliest colonial era and beyond to the present. For example, as described above in the section on the Public Trust Doctrine, the Public Waterfront Act can trace its heritage from Roman law through English Common Law, and remains a key component of coastal regulatory review to this day. In addition to state law, a range of federal, regional, and local regulatory requirements may also apply. Most large coastal or offshore developments in Massachusetts will require action by numerous agencies, of which critical processes are outlined below.

The administrative interaction among federal, state, regional, and local reviews is often quite complicated, and coordination of the various review processes can be a challenge in and of itself. In addition, some federal laws (such as the Clean Water Act) delegate administration of aspects of the law to the state, and some state laws (such as the Wetlands Protection Act) delegate aspects of implementation to municipalities.

To analyze the array of statutes, regulations and other statutes that affect development, use and protection of the state's oceans, the Task Force established a Policy Working Group. This working group held various meetings with state agency program managers, industry representatives, the regulated community, advocates and other stakeholders to identify the strengths, shortcomings, and gaps within the Commonwealth's existing ocean management system.

In addition to developing discrete recommendations to improve upon the Commonwealth's existing ocean management programs, the Policy Working Group served to inform the entire Task Force in its efforts to develop a comprehensive framework for ocean management. In November, the Policy Working Group merged with the Frameworks Working Group. This section of the report summarizes the research

on statutes, regulations and policies that was carried out in support of the work of this combined Policy/Frameworks Working Group.

The geographic scope of the Ocean Management Task Force and the Commonwealth's management authority is limited to state jurisdiction, which generally extend three miles offshore from the mean low tide line. Federal waters extend from the limit of state waters to 200 miles offshore, an area known as the exclusive economic zone. While the state holds the legal interest in the ocean generally three miles off shore, it is important to note that the federal government retains significant legal authority over activities in state waters.
The Task Force was convened to examine issues with the state regulatory system, and therefore is not evaluating federal law, although the Task Force has reviewed and included recommendations on how the state implements its delegation of authority from certain federal statutes. The summary below is intended to provide a quick review of the key statutes most likely to apply to large coastal projects. Several federal review processes that operate without delegation to the state are critical to the planning, design, review, and implementation of projects in state waters, and thus are included in this summary for informational purposes.

Massachusetts Statutes, Regulations and Policies relating to Uses of the Ocean

Massachusetts Environmental Policy Act (MEPA) (M.G.L. c. 30 ss 61-62H and 301 CMR 11.00)

MEPA ensures that proponents study alternatives to proposed actions and avoid, minimize, and mitigate environmental impacts of proposed actions. MEPA review is not a permitting process, but rather it is an information-gathering process that precedes final action by state permitting agencies. MEPA applies when a proposed project meets or exceeds a filing threshold and requires a state agency action. The proponent files an Environmental Notification Form (ENF) with the Secretary of Environmental Affairs, which begins the public environmental review process. The Secretary receives comments, holds scoping meetings, reviews the ENF, and then issues a decision on whether further MEPA review is required. If further review is required, the Secretary specifies what issues require further analysis and the proponent prepares an Environmental Impact Report (EIR), which is then filed and undergoes another public comment period. EIR review is usually a two-step process, with Draft and Final EIRs required. After the Secretary determines that a Final EIR adequately complies with MEPA (or immediately in the case when no EIR is required), state agencies may take final permitting decisions on the project. The state permitting agencies must make "Section 61 Findings" for any project for which an EIR is completed. The Section 61 Findings essentially incorporate the mitigation and analysis from the EIR process into the state permitting decisions.

MEPA ensures that the public has input into the environmental review process and that state agencies have adequate information with which to conduct their permitting reviews. Because MEPA review precedes permitting and encourages comment from all public and

private interested parties, the MEPA process often becomes the primary forum in which controversial issues are raised and addressed and in which agency and public comments are coordinated and incorporated into project design. MEPA also serves as the primary vehicle for coordinating the state review process with the federal NEPA process and regional review processes with the Cape Cod Commission.

Public Waterfront Act (M.G.L. c 91 and 310 CMR 9.00)

Commonly known as Chapter 91 and administered by the Department of Environmental Protection, this law protects the public's rights to access the waterfront for use and enjoyment of waterways of the Commonwealth, and codifies the Massachusetts version of the Public Trust Doctrine into statute. The focus of Chapter 91 often involves waterfront development issues, where the Chapter 91 regulations promote preservation of tidelands for water-dependent uses requiring direct access to the water, and preserve public access when tidelands are developed privately. However, it is important to remember that Chapter 91 also governs lands owned by the Commonwealth and held in trust for its citizens out to the limits of the Territorial Sea. For infrastructure, such as submarine pipelines and cables, the vast majority of the project subject to Chapter 91 jurisdiction lies in the subtidal areas seaward of the immediate area of the shoreline. Chapter 91 also sets fees for the occupation of tidelands. These fees have remained constant since the 1970's, and may appropriately be thought of as "rent" paid for the physical occupation of Commonwealth trust lands.

Ocean Sanctuaries Act (M.G.L. c 132A, ss 12A-16F, 18 and 302 CMR 5.00)

Currently, much of the Territorial Sea is included within one of the five designated Ocean Sanctuaries. The Act is administered by the Department of Conservation and Recreation (DCR), and prohibits activities that may significantly alter the ecology or appearance of the ocean, seabed, or subsoil of a designated sanctuary. The prohibitions may be waived (except within the Cape Cod Ocean Sanctuary) upon a finding by DCR that the project meets a six-part test of "public necessity and convenience." Projects that are below MEPA filing thresholds and projects that receive Chapter 91 licenses are presumed to comply with the Act. There is no separate permitting process associated with the Act. DCR review pursuant to the Act is incorporated into the MEPA and Chapter 91 review processes.

Wetlands Protection Act (M.G.L. c 131 s 40 and 310 CMR 10.00)

The Act is administered by local Conservation Commissions and DEP and ensures protection of wetland resources, including all coastal areas between Mean High Water and the limits of the Territorial Sea. The regulations require avoidance, minimization, and mitigation of impacts (including impacts to aquatic vegetation, flood control, and fisheries and wildlife habitat), and establish performance standards that define levels of impact that a project cannot exceed. For projects that meet the performance standards, local Conservation Commissions may issue an Order of Conditions specifying under what conditions a project may proceed. The applicant or any 10 citizens may appeal the

local Order to DEP, which then issues a Superseding Order confirming, modifying, or overturning the local decision (a further appeal to an adjudicatory process is possible). For projects that do not meet the performance standards, a proponent must obtain a variance from the regulations from DEP, upon a demonstration that the project meets the tests for a variance. The variance tests include provisions that the project serves an "overriding public interest," that there are no feasible alternatives to the project, and that the project design incorporates substantial mitigation for impacts to wetland resources.

Clean Water Act, Section 401 Water Quality Certification (33 USC 1341 et seq., s 401; M.G.L. c 21 ss 26-53 and 314 CMR 4.00 and 9.00)

The Section 401 process is administered by DEP. The review ensures that projects proposing discharge of fill or dredged materials into jurisdictional wetlands comply with Massachusetts Surface Water Quality Standards, the Massachusetts Wetlands Protection Act, and otherwise avoid, minimize, or mitigate impacts to areas of Massachusetts subject to Section 401. Section 401 applies to any project that is subject to federal regulation under the Clean Water Act. If the project results in minimal fill within wetlands, the local Order of Conditions can also serve as the Section 401 Water Quality Certificate; otherwise, an individual permit review process by DEP is required. Consultation between DEP and the Division of Marine Fisheries usually occurs during the Section 401 review process to ensure that impacts to finfish and shellfish and their habitat are minimized.

Coastal Zone Management Act (16 USC 1451 et seq and 15 CFR 930; M.G.L. c 21A ss 2, 4 and 301 CMR 20.00)

The federal Coastal Zone Management Act encourages states to regulate development within their defined coastal zones and grants the power of Consistency Review to states with federally approved Coastal Zone Management Plans (CZMP). In Massachusetts, the Office of Coastal Zone Management implements the state CZMP and ensures that projects comply with the enforceable policies of the CZMP. Consistency Review ensures that any federal activities (either projects proposed by a federal agency or permitted by a federal agency) are consistent with the state CZMP. The CZMP includes policies affecting water quality, marine habitat, protected areas, coastal hazards, port/harbor infrastructure, public access, energy, ocean resources, and growth management. The federal government may not take action on a project until the state CZM Office certifies that the project is consistent with the CZMP. For federally permitted projects, an applicant can appeal a consistency determination to the U.S. Secretary of Commerce.

Other State Authorities

Other state agencies may also be involved in a review depending on resources present in a project area. For example, the Division of Fish and Game, Massachusetts Historical Commission, and Massachusetts Board of Underwater Archaeology all review coastal projects for impacts on resources under their respective jurisdictions. In some cases, the review is coupled with review by other agencies, such as MEPA or DEP. In other cases,

agencies may have separate permitting processes (for example, if the project results in the "take" of a rare species).

The Division of Marine Fisheries, for example, manages living marine, estuarine, and anadromous resources within the waters of the Commonwealth. The Division may adopt, amend, or repeal all rules and regulations, with the approval of the Governor, necessary for the maintenance, preservation and protection of all marine fisheries resources within its jurisdiction. The Division works closely with NOAA Fisheries, the New England Fisheries Management Council, the Mid-Atlantic Fisheries Management Council, and the Atlantic States Marine Fisheries Commission to craft regulations that create sustainable, healthy fisheries in compliance with Fishery Management Plans.

Marine Mammals Protection – Federal and State Authorities

In the United States the primary federal legislation that provides for the protection and management of marine mammals is the Marine Mammal Protection Act (MMPA). The federal Endangered Species Act (ESA) also provides protection to the five species of great whales and five species of marine turtles.

Under the ESA, the National Marine Fisheries Service (NMFS) has designated critical habitat for the Right Whale in the New England area in Cape Cod Bay and the Great South Channel. The NMFS Office of Protected Species has also created a multi-organizational Northeast Large Whale Recovery Plan Implementation Team. This team examines the causes of human induced mortality to large whales and proposes ways to reduce or eliminate them.

The Massachusetts Endangered Species Act (MGL: Chapter 131A) and its implementing regulations (321 CMR 10.00) protect the habitats of federal and state listed endangered, threatened and special concern species. The Division of Fisheries and Wildlife works with NMFS in a cooperative agreement for endangered marine species under the provisions of the federal ESA. This allows the Commonwealth of Massachusetts to share management authority for these species with NMFS.

The following is a list of Massachusetts laws and regulations that protect marine mammals:

- Massachusetts General Laws Chapter 130 section 101A provides protection to the gray seal.
- The Massachusetts Division of Marine Fisheries has promulgated regulations (322 CMR 12.00) for the protection of the northern right whale. The regulations establish a 500-yard buffer zone around the right whale.
- The Wetlands Protection Act (MGL Chapter 131, Section 10) includes wildlife habitat as a protected interest of the act. The Act also provides protection for areas designated as "estimated habitat" for state-listed, wetlands-dependent rare species. The Act specifically prohibits a project from causing any short or long-term adverse impacts to the designated estimated habitats of these species. Cape Cod Bay is a designated estimated habitat for the Northern Right Whale.

- The Northern Right Whale is also designated the Commonwealth's official Marine Mammal (MGL Chapter 2 Section 16).

National Environmental Policy Act (NEPA) (42 USC ss 4321 to 4370e and 43 FR 55990)

NEPA established environmental protection as a national policy goal and directed all federal agencies to consider the environmental consequences of their projects and permitting actions. NEPA set up a system for formal evaluation of environmental impacts of the actions of federal agencies, the centerpiece of which is the Environmental Impact Statement (EIS). This document includes an analysis of alternatives to the proposed action, a discussion of impacts from the proposed action, and disclosure of any irretrievable commitment of resources. Typically, a federal agency with an action on a project will prepare an Environmental Assessment. Following publication in the Federal Register and a comment period, the agency will either issue a Finding of No Significant Impact or will decide to prepare an EIS to more fully examine alternatives, impacts, and mitigation. One federal agency is usually designated as the "lead" agency, and this agency will prepare the EIS. Other federal and state agencies may play an official role in preparation by becoming "cooperating" agencies with the lead agency. At the completion of the EIS process, the lead agency issues a Record of Decision making environmental findings.

Rivers and Harbors Act of 1899 (33 USC ss 401-413 and 33 CFR 323) and Clean Water Act, Section 404 (33 USC s 1251 and 33 CFR 322)

The RHA regulates navigation in waters of the United States, although in recent years the application of the Act has broadened to include environmental considerations. Section 10 of the Act regulates placement of structures in navigable waters. Section 404 regulates discharges of dredged or fill material into waters of the United States. The U.S. Army Corps implements both statutes. For small projects subject to these laws, the Army Corps has issued a Massachusetts Programmatic General Permit establishing general performance standards for all work. For larger projects, individual permit applications are required.

Other Federal Authorities

Other federal agencies may also be involved in a review depending on resources present in a project area. For example, the National Marine Fisheries Service, U.S. Fish and Wildlife Service, Federal Aviation Administration, and Coast Guard review coastal projects for impacts on resources under their respective jurisdictions. In some cases, the review is coupled with review by other agencies, such as the Corps, and/or coupled with analysis in the NEPA process. In other cases, agencies may have separate permitting requirements (for example, if the project results in the "take" of a rare species or marine mammal).

Regional Authorities

Projects located on Cape Cod or Martha's Vineyard (or in waters within municipal boundaries of either) may be subject to review by the Cape Cod Commission or Martha's Vineyard Commission. Both Commissions review projects and must issue a determination that net benefits of a project outweigh negative impacts. Both Commissions review initial project applications to determine if the impacts warrant further review as a Development of Regional Impact (DRI). Review by the Cape Cod Commission is often coordinated with MEPA review. Any project requiring an EIR under MEPA automatically becomes a DRI with the Cape Cod Commission.

Increasing Development Pressure on Ocean Resources

In addition to the more traditional uses of fishing, recreation, and commerce, government regulators are seeing an increasing number of development proposals for a variety of uses of our ocean resources. Seawalls, jetties, docks, and piers continue to dot our coast. The lack of available land-based resources and rapid advances in technology are also driving a new generation of innovative project proposals for potential uses of ocean resources. Proposals for offshore wind energy farms, deep water sand mining, underwater utility infrastructure crossings and pipelines, and aquaculture project proposals are being reviewed, and one can only assume that even more projects and innovative uses are on the horizon. Many of these types of uses were never contemplated when our laws and regulations were drafted, and consequentially have highlighted several policy issues related to appropriate siting and permitting. In the last year alone, government agencies have reviewed or have been consulted about the following types of projects:

Offshore Wind Farms (Cape Wind and Winergy projects) – our need for clean renewable energy, rapid advances in technology, and the strong winds off of our coast are driving forces behind the development of wind energy facilities off of Massachusetts. Six proposed wind farm projects off of the Massachusetts coast have commenced review by state and federal agencies. Three proposals (Cape Wind Nantucket Sound, Winergy Nantucket Shoals, and Winergy Davis Bank) have involved large wind farms in federal waters with cable connections through state waters and onto the mainland. Three other proposed projects (Winergy Falmouth, Winergy Truro, and Winergy Gloucester) involve relatively small (18MW) developments wholly within state waters and lands.

Underwater Electric Transmission and Fiber Optic Cables – New England Electric permitted and built a submarine electric cable (35 megawatt capacity) from Harwich to Nantucket in the mid 1990's. In early 2004, the MEPA review of a second New England Electric cable (this time from Barnstable to Nantucket) was completed. In addition, a third submarine cable connects Martha's Vineyard to the mainland electric grid. Several fiber optic and communications cables also traverse portions of the Massachusetts Territorial Sea, connecting communications infrastructure in Massachusetts to facilities in Europe.

Underwater Pipelines (Duke Energy's Hubline project) – this major infrastructure project, now fully permitted and constructed, involved the development of a new natural

gas pipeline in Massachusetts uplands and in the waters of the Commonwealth. The project included 24.8 miles of mainland pipeline and 29.4 miles of predominantly marine pipeline from Beverly harbor to Weymouth. In addition to the state MEPA review and federal NEPA review, more than 10 state regulatory programs and resource agencies were involved in permitting. The major issues during review were water quality, use of public tidelands, and marine fisheries impacts. This project was the first pipeline ever permitted in a Massachusetts ocean sanctuary.

Offshore Sand Mining (DCR's Winthrop Shores) – the demand for high volumes of sand to protect our shores and renourish our beaches is the impetus behind the first major offshore sand mining project proposed in Massachusetts waters. This proposed project would mine one million cubic yards of sand and gravel from the sea bottom to be deposited at Winthrop and Nantasket beaches. While similar projects have been conducted in other states and are contributing to a body of knowledge, much of the data collected pertains to sand mining, as opposed to sand and gravel that is being considered here and that will impact a complex cobble/gravel habitat. This project will also have impacts on water column characteristics, fishes, and invertebrates.

Summary of Key Policy Findings

An examination of the Commonwealth's existing regulatory tools for ocean management and the various types of projects that are being proposed for use of our ocean resources, revealed some policy gaps and shortcomings of the regulatory process that should be addressed by the Commonwealth. The following is a summary of the key findings of the Task Force:

- As the territorial waters of Massachusetts are held by the Commonwealth in trust for its citizens, ocean managers must protect the public's interest in this important resource. A comprehensive ocean management framework could strengthen protection of ocean resources and public trust rights, but should also be flexible enough to encourage uses that benefit the public. These uses may include, but are not limited to, uses that promote public policy objectives such as fostering sustainable fisheries and other water dependant uses, expanding public access to ocean resources, protecting biodiversity, and promoting renewable energy to reduce climate change.

- Ocean management laws, regulations and policies are currently designed to respond to project proposals and are reactive, rather than proactive. No clear mechanism exists for state agencies to create a common vision or plan for the appropriate use of ocean resources.

- The permitting process for ocean project often involves multiple state agencies with overlapping responsibilities and duplicative authority. The permitting process could be strengthened to ensure protection of ocean resources and public trust rights while also improving the clarity and predictability of permitting.

- Compensation for the use of the state ocean resources are artificially low and do not distinguish between types of uses. Furthermore, the revenues generated from such projects are not currently used for ocean-related purposes.

- Coordination among state agencies could be improved with respect to large project permitting and determining appropriate mitigation for potential impacts.

- Compliance and enforcement of coastal laws and regulations should be strengthened and penalties should be better utilized for coastal and marine related protection, restoration, and management activities.

- The current decentralized, single-sector oriented approach to ocean management does not allow for the protection of special resource areas from other potentially conflicting uses. No clear authority exists to create exclusive fishing areas or biodiversity protection area where productive fishing grounds or special resources exist.

- The Commonwealth should continue to strengthen its relationship with federal agency partners where overlapping jurisdiction exists. The Commonwealth should pay particular attention to proposed activities in federal waters that have the potential to impact state resources.

The Policy Frameworks working group originally started as two separate but overlapping working groups of the Ocean Management Task Force (the Frameworks working group was a "subcommittee of the whole" that included direct input from virtually every member of the Task Force). As the Task Force continued its discussions, it became clear that the relationship between a coordinated ocean policy and the framework for an ocean governance structure were inseparable items. For any policy to be fair and effective, there must be a framework in place to ensure coordination among agencies, mechanisms for balancing sometimes-competing interests, and opportunities for the general public and specific ocean interest groups to have effective input into the policy making process. The reverse also holds true- any framework for ocean governance must allow clear articulation of policy goals and ensure an appropriate mechanism for development of policy. This interrelationship between substance (policy) and procedure (frameworks) lead directly to the recommendation for a Comprehensive Ocean Resources Management Act discussed in detail elsewhere in this report. Emphasizing this close relationship, the Policy working group and the Frameworks working group merged into one group and began developing the details of the CORMA. The combined group also recognized that changes to existing regulations, policies, and practices, either in tandem or independent of CORMA, could help further the goal of an integrated system for ocean governance in Massachusetts. These changes to the existing system are reflected in the "Governance" and "Management Tools" recommendations.